Public Prosecutor v Muhammad Rohimie bin Ab Llah Zawawi

A

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 41S-82–06 OF 2012
AMELIA TEE ABDULLAH J
2 APRIL 2014

B

Criminal Procedure — Appeal — Appeal against acquittal and discharge — Appeal by prosecution — Accused person charged for offence of culpable homicide — Accused person acquitted and discharged on charge without being called to enter defence — Accused person kicked deceased in chest during ragging — Whether actus reus and mens rea proven — Whether there was causation link between accused person's action and death of deceased — Penal Code s 304(b)

C

D

The respondent was charged with an offence of culpable homicide not amounting to murder under s 304(b) of the Penal Code. At the close of the prosecution's case, the magistrate had acquitted and discharged the respondent on the charge without calling upon him to enter his defence. Being dissatisfied with the magistrate's order of acquittal and discharge on the charge, the public prosecutor filed an appeal against the said order. PW8 and PW9 who were present at the time of the incident gave testimonies that 28 Form 4 students of Company Bravo at Maktab Tentera Diraja Sg Besi (including PW8, PW9 and the deceased) were ordered by one Amirul Afiq to enter Dorm Dash 4 Company Bravo. Amirul Afiq, who was not called as a witness during the trial, was the 'Senior Under Officer' or 'SUO'. The SUO had then carried out a series of ragging for long periods and without rest. They were also directed to form a human pyramid with the student at the highest point being required to hit the ceiling without the pyramid toppling over. Although the students had attempted to comply however the pyramid had collapsed and the students had fallen on top of each other. The SUO and the seniors had become angry over this and one of them had uttered abusive words. However, Muhammad Halim thought that it was one of the Form 4 students who had uttered the words and had demanded that the culprit should own up. When no one owned up, the seniors decided to impose a 'hukuman berbentuk penalti'. The Form 4 students were directed to assume a hemmer light position where they would then be kicked by one of the senior 'di bahagian depan badan dan bawah'.When it was the deceased's turn to be kicked, the respondent had entered Company Bravo at that time and such it was that it was the respondent who took the kick at the deceased. The respondent kicked only once from the right hand side of the deceased. After the kick, the deceased had risen but had suffered difficulty in breathing. He had collapsed. One of the persons present had attempted unsuccessfully to give the deceased CPR. Thereafter they had reported the incident to the warden. The deputy public prosecutor that there is

E

F

G

H

I

a causation link between the respondent's action and the death of the deceased in that if not for the action of the respondent in kicking the deceased with force at 'bahagian dada', the deceased would not have died.

Held, dismissing the appeal and affirming the order of acquittal and discharge:

(1) In order to prove the causation link, the prosecution would have to first prove the actus rea namely that it was the respondent that had caused the act which triggered the cardiac arrest or heart attack or that the deceased's heart attack was caused by the respondent's act in kicking him on his chest or *dada* from the right side and under the deceased. Although it is in evidence that on the day in question, the Form 4 students including the deceased had undergone a series of rigorous exercises or ragging or bullying by the SUO and the seniors, whether these had in fact contributed to the deceased's subsequent heart attack is but mere conjecture (see paras 24 & 28).

(2) The court was unable to agree with the prosecution that the magistrate had made a finding of fact as to the position of the deceased in the pyramid. The reference to SP8 and SP9 not being able to determine where exactly was the deceased's position in the pyramid as well as the use of the word 'sekiranya' would show that the magistrate had not made any finding of fact to the effect that the deceased's position was at the bottom of the pyramid (see para 31).

(3) Whilst it was true that none of the prosecution witnesses had testified as to the manner in which and by whom the CPR was administered on the deceased, it was questionable whether this factor was of any particular importance in the decision of the magistrate in not calling for the defence. Although the magistrate might well have considered some factors which should not have been considered in arriving at her decision not to call upon the respondent to enter upon his defence, the court was of the view that, in the final analysis, the main and most important issue for the consideration of the court was whether the magistrate was correct in her finding that the prosecution had failed in proving the essential ingredients of the charge (see paras 34–35).

(4) Whilst the prosecution might not be required to prove that the respondent knew that the deceased was suffering from a medical condition of having no left circumflex coronary artery, however the court was of the considered view that the appellant could not run away from the necessity of having to prove not only that it was the respondent who had done an act (the actus rea) but also that he had the requisite knowledge (the mens rea) under s 304(b) that the act that was done was likely to cause death or to cause such bodily injury that was likely to cause death. The appellant had failed to prove that the respondent had the

knowledge that his action of kicking the deceased in the chest, albeit hard, was likely to cause death (see paras 45–46).

[Bahasa Malaysia summary

Responden dituduh kerana kesalahan homisid salah yang tidak terjumlah kepada kesalahan membunuh di bawah s 304(b) Kanun Keseksaan. Di penutup kes pendakwaan, majistret telah membebaskan dan melepaskan responden atas pertuduhan tanpa memanggilnya untuk memasukkan pembelaannya. Berasa tidak puas hati dengan perintah pembebasan dan pelepasan ke atas pertuduhan itu, pendakwa raya telah memfailkan rayuan terhadap perintah tersebut. PW8 dan PW9 yang hadir di tempat kejadian telah memberikan keterangan bahawa 28 pelajar Tingkatan 4 Company Bravo di Maktab Tentera Diraja Sg Besi (termasuk PW8, PW9 dan si mati) telah diarah oleh Amirul Afiq untuk masuk ke Dorm Dash 4 Company Bravo. Amirul Afiq, yang tidak dipanggil sebagai saksi semasa perbicaraan, merupakan 'Senior Under Officer' atau 'SUO'. SUO kemudian telah menjalankan sesi 'ragging' untuk tempoh yang lama dan tanpa rehat. Mereka juga telah diarahkan untuk membentuk piramid manusia di mana pelajar di puncak tertinggi dikehendaki mencecah siling tanpa menjatuhkan piramid itu. Walaupun pelajar-pelajar itu cuba berbuat demikian namun piramid itu jatuh dan pelajar-pelajar itu jatuh di atas satu sama lain. SUO dan pelajar senior menjadi marah tentang ini dan salah seorang daripada mereka mengeluarkan kata-kata kesat. Walau bagaimanapun, Muhammad Halim menyangka bahawa ia adalah salah seorang daripada pelajar Tingkatan 4 yang telah mengeluarkan kata-kata kesat itu dan meminta pelakunya mengaku. Apabila tiada sesiapa mengaku, pelajar-pelajar senior membuat keputusan untuk mengenakan 'hukuman berbentuk penalti'. Pelajar-pelajar Tingkatan 4 itu diarahkan untuk berada dalam kedudukan tukul di mana mereka kemudian disepak oleh salah seorang daripada pelajar senior 'di bahagian depan badan dan bawah'. Apabila ia adalah giliran si mati untuk disepak, responden telah masuk dalam Company Bravo pada masa tersebut dan oleh itu responden yang menyepak si mati. Responden hanya menyepak sekali di bahagian kanan si mati. Selepas sepakan itu, si mati bangun tetapi mengalami kesukaran untuk bernafas. Dia kemudian rebah. Salah seorang yang berada di situ cuba untuk memberi bantuan pernafasan kepada si mati tetapi gagal. Berikutan itu mereka telah melaporkan kejadian kepada warden. Timbalan pendakwa raya berhujah bahawa terdapat pautan penyebab antara tindakan responden dan kematian si mati yang mana jika bukan kerana tindakan responden menyepak kuat si mati di 'bahagian dada', si mati mungkin tidak meninggl dunia.

Diputuskan, menolak rayuan dan mengekalkan perintah pembebasan dan pelepasan:

(1) Bagi tujuan membuktikan pautan penyebab, pendakwaan perlu terlebih dahulu membuktikan actus rea iaitu bahawa ia adalah responden yang

telah menyebabkan perbuatan yang mencetus jantung terhenti atau serangan jantung atau serangan jantung si mati telah disebabkan oleh perbuatan responden menyepaknya di dada dari bahagian kanan dan bawah si mati. Walaupun ianya terdapat dalam keterangan bahawa pada hari yang dipersoalkan, pelajar-pelajar Tingkatan 4 itu termasuk si mati telah menjalani siri latihan yang berat atau *ragging* atau dibuli oleh SUO dan pelajar-pelajar senior, sama ada yang berikut pada hakikatnya telah menyumbang kepada serangan jantung si mati berikutan itu adalah hanya tekaan semata-mata (lihat perenggan 24 & 28).

(2) Mahkamah tidak dapat bersetuju dengan pendakwaan bahawa majistret telah membuat penemuan fakta berhubung kedudukan si mati dalam piramid itu. Rujukan kepada SP8 dan SP9 yang tidak dapat menentukan di mana sebenarnya kedudukan si mati dalam piramid itu dan juga penggunaan perkataan 'sekiranya' menunjukkan bahawa majistret tidak membuat apa-apa penemuan fakta yang bermaksud bahawa kedudukan si mati adalah di bawah piramid itu (lihat perenggan 31).

(3) Walaupun ia adalah benar bahawa tiada antara saksi pendakwaan yang telah memberi keterangan berhubung cara bagaimana dan oleh siapa bantuan pernafasan itu dilakukan ke atas si mati, ia boleh dipersoalkan sama ada faktor ini mempunyai apa-apa kepentingan tertentu dalam keputusan majistret untuk tidak memanggil pembelaan. Walaupun majistret mungkin telah mempertimbangkan beberapa faktor yang tidak patut diambil kira dalam membuat keputusan beliau untuk tidak memanggil responden untuk memasuki pembelaannya, mahkamah berpendapat bahawa, dalam analisis akhir, isu utama dan paling penting untuk pertimbangan mahkamah adalah sama ada majistret itu betul dalam penemuannya bahawa pendakwaan telah gagal membuktikan elemen utama pertuduhan (lihat perenggan 34–35).

(4) Walaupun pendakwaan mungkin tidak dikehendaki membuktikan bahawa responden mengetahui bahawa si mati mengalami keadaan kesihatan kerana tidak mempunyai arteri koronari sirkomfleks di sebelah kiri, bagaimanapun mahkamah berpendapat bahawa perayu tidak boleh mengelak daripada perlu membuktikan bukan hanya ia adalah responden yang melakukan perbuatan (actus rea) itu tetapi juga bahawa dia mempunyai pengetahuan yang diperlukan (mens rea) di bawah s 304(b) bahawa perbuatan yang dilakukan tersebut berkemungkinan menyebabkan kematian atau menyebabkan kecederaan pada badan yang berkemungkinan menyebabkan kematian. Perayu telah gagal untuk membuktikan bahawa responden mempunyai pengetahuan bahawa perbuatannya menyepak si mati di dada, walaupun kuat, berkemungkinan menyebabkan kematian (lihat perenggan 45–46).]

Notes

For cases on appeal against acquittal and discharge, see 5(1)*Mallal's Digest* (4th Ed, 2014 Reissue) paras 214–219.

Cases referred to

Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
PP v Mahfar bin Sairan [2000] 4 MLJ 791, HC (refd)

Legislation referred to

Criminal Procedure Code s 173(f)
Penal Code ss 299, Explanation 1, 304(b)

Faizah bt Mohd Salleh (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Badrul Munir (Syed Ismail bin Syed Mohd with him) (Shafee & Co) for the respondent.

Amelia Tee Abdullah J:

[1] The respondent, Muhammad Rohimie bin Ab llah Zawawi, was charged with an offence of culpable homicide not amounting to murder under s 304(b) of the Penal Code. On 21 June 2012, at the close of the prosecution case, the learned magistrate had acquitted and discharged the respondent on the charge without calling upon him to enter his defence.

[2] Being dissatisfied with the learned magistrate's order of acquittal and discharge on the charge, the public prosecutor has filed an appeal against the said order.

[3] The charge against the respondent at the magistrate's court reads as follows:

> Bahawa kamu pada 23/06/2010, jam lebih kurang 11.40 malam di Blok A, Tingkat 2 bilik Desh 4 Bravo Maktab Tentera Diraja, Kern Tentera Sg Besi, di dalam daerah Cheras, Wilayah Persekutuan Kuala Lumpur, telah menyebabkan kematian Mohammad Naim Mustaqim Bin Muhammad Sobri, No. Kad Pengenalan 940415-08-6329 dengan mengetahui bahawa perbuatan kamu mungkin menyebabkan kematiannya dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah Seksyen 304 (b) Kanun Keseksaan.

THE FACTS

[4] The facts of the case can be culled primarily from the evidence of PW8 and PW9 who were present at the time of the incident. On 23 June 2010 at

about 10.30pm, 28 Form 4 students of Company Bravo at Maktab Tentera Diraja Sg Besi (including PW8, PW9 and the deceased) were ordered by Amirul Afiq to enter Dorm Dash 4 Company Bravo. Amirul Afiq, who was not called as a witness during the trial, was the 'Senior Under Officer' or 'SUO'. Apart from the SUO, there were two Form 5 students, Syed Faris Al-Sagoff and Muhammad Halim who were also not called as witnesses during the hearing.

[5] The SUO had then carried out a series of ragging which had included squad jump, hopping, commoderest, push ups, 'depangan tangan' for long periods and without rest. They were also directed to form a human pyramid with the student at the highest point being required to hit the ceiling without the pyramid toppling over. Although the students had attempted to comply however the pyramid had collapsed and the students had fallen on top of each other.

[6] The SUO and the seniors had become angry over this and one of them had uttered abusive words. However, Muhammad Halim thought that it was one of the Form 4 students who had uttered the words and had demanded that the culprit should own up. When no one owned up, the seniors decided to impose a 'hukuman berbentuk penalty'. The Form 4 students were directed to assume a hemmerlight position where they would then be kicked by one of the senior 'dibahagian depan badan dan bawah'.

[7] What is this hemmerlight position? This has been demonstrated by PW8 and can be described as 'badan angkat, tangan di lantai, kaki di lantai' or a push-up position but with the arms and legs straight and together.

[8] When it was the deceased's turn to be kicked, the respondent had entered Company Bravo at that time and such it was that it was the respondent who took the kick at the deceased. There respondent kicked only once *from the right hand side of the deceased*.

[9] After the kick, the deceased had risen but had suffered difficulty in breathing. He had collapsed. One of the persons present had attempted unsuccessfully to give the deceased CPR. Thereafter they had reported the incident to the warden.

THE GROUNDS OF APPEAL

[10] The public prosecutor's appeal is premised on a number of broad grounds, namely:

(a) *Grounds 3.1, 3.2 and 3.2* pertaining to the evidence adduced that the respondent had caused the death of the deceased and the causation link

between the action of the respondent and the death of the deceased;

(b) *Ground 3.4* — whether the magistrate had drawn inferences and assumptions which were not based on the evidence of the prosecution witnesses;

(c) *Ground 3.5* — that the magistrate had drawn an assumption that 'sekiranya si mati berada di bahagian bawah sekali sudah tentulah impak yang mengenai badan si mati semasa pyramid ini roboh adalah lebih kuat berbanding mereka yang berada di atas' when PW8 and PW9 did not state so in their evidence; and

(d) *Clauses 3.7 and 3.8* — whether the learned magistrate had failed to consider the existence of knowledge on the part of the respondent that his 'tendangan kuat' on the deceased could have caused his death or cause such injury that could cause death/whether the learned magistrate had erred in law and fact when she found that that the prosecution had failed to prove that the respondent had the requisite knowledge as there was no evidence that such an incident had ever occurred at the Maktab.

[11] *Grounds 3.1 3.2 and 3.3 of the petition of appeal* pertains to whether the learned magistrate was in error when she failed to consider that it was the action of the respondent which had caused the death of the deceased, that there was a causation link between the action of the respondent and the death of the deceased and that consequently, the learned magistrate was in error when she did not call upon the respondent to enter upon his defence.

[12] In her written submissions, the learned deputy public prosecutor had referred to the evidence of the prosecution's three main witnesses, namely PW8, PW9 and PW7, which she submits, has established a prima facie case. The court has thus carefully scrutinised the evidence adduced from these three witnesses.

[13] 'PW8' is Nazmirul Izzad bin Nasir, a student at the Maktab Tentera Diraja at the material time. He was present when the respondent kicked the deceased as is evident from his evidence at pp 96–97 of the appeal records:

> Salah seorang daripada senior kami, Asyraf Fitri telah mencarut. Muhammad Halim pula menyangka kami yang mencarut dan dia menyuruh untuk kami mengaku siapa yang carut. Namun kami tak beritahu apa-apa seterusnya hukuman yang menyepak. Namun kami tak mengaku dan Muhammad Halim menyuruh kami untuk dibahagikan pada 3 kumpulan untuk menjalani hukuman. Hukumannya adalah dalam keadaan hemmerlight dan disepak di dada. Ya, saya dan kawan-kawan saya dalam keadaan hemmerlight dan disepak di dada.
>
> Pada kumpulan Muhammad Halim, Naim Mustaqim menawarkan diri namun Rohimie yang menyepak Naim Mustaqim. Rohimie adalah senior saya dalam kumpulan ini.

> Selepas itu, Naim terus bangun dan cuba untuk bernafas dan tiba-tiba rebah. Naim Mustaqim ini adalah ahli squad saya. Ya, saya sendiri melihat Rohimie menyepak Naim Mustaqim. *Naim disepak di bahagian dada. Dia disepak sekali*. Reaksi Naim selepas dia disepak, dia dalam keadaan cuba bernafas. Dan selepas itu, dia rebah. Naim masa disepak dalam keadaan hemmerlight. Dia dalam keadaan push up biasa cuma tangan diletakkan bersama ...
>
> Ya, saya juga dalam keadaan yang sama sewaktu Naim disepak. *Semasa Naim ditendang*, saya betul-betul dihadapan dia. *Rohimie waktu berdiri, dia di sebelah sisi kanan Naim Mustaqim*. Saya dan Naim jarak saya ... ke bucu meja pertama peguambela.
>
> (Permerhatian Mahkamah: lebih kurang 2 kaki.) (Emphasis added.)

[14] As regards the force of the kick, PW8 stated at p 98 of the appeal records that 'tendangan itu kepada Naim agak kuat, saya dengar bunyi tendangan'.

[15] The learned deputy public prosecutor had also drawn the court's attention to the fact that PW8 had, during cross-examination, responded to a question as to whether the kick was aimed at the deceased's 'dada sebelah kanan', with: 'Itu tidak pasti' (p 114). The court notes that when PW8 was re-examined on this point, he had tried to explain that whilst he 'tidak nampak di mana (sepakan itu terkena) tapi saya tahu duduk sepakan di bahagian tapi tidak tahu di mana, bahagian mana'. When pressed further as to which 'bahagian' he was unsure of, his response was:

> Tak pasti tapi saya tahu di sini. (*Memegang dada kanan*) (Emphasis added.)

[16] The evidence of 'PW9', Vickneshwaran a/l K Vasutharan, would corroborate that of PW8. At p 122 of the appeal records, PW9 states as follows:

> Pada ketika Putra Kanan Rohimie masuk ke dalam bilik, Naim Mustaqim sedang hemmerlight di hadapan pintu, dia sedang bersedia untuk mendapat tendangan daripada senior. Pada ketika itu, Putra Kanan Rohimie masuk ke dalam bilik. Dan senior yang sepatutnya memberi tendangan kepada Naim tidak buat tapi Putra Kanan Rohimie yang mengambilnya. Saya dalam keadaan hemmerlight bersama-sama skuad saya. Saya nampak situasi Naim Mustaqim dalam keadaan hemmerlight dan ditendang dibahagian dada oleh Putra Kanan Rohimie. Ya, saya dan Naim pada masa itu berada dalam keadaan hemmerlight. Tendangan bunyi yang sangat kuat bermakna tendangan yang kuat ke arah dadanya.

[17] And at p 123 of the appeal records, PW9 had continued:

> Dengar bunyi yang kuat bermakna tendangan yang kuat. Satu-satu tendangan yang lepaskan bermakna kita sakit, arwah sempat bangun, dia bangun dan sempat bergerak few steps. Selepas itu dia rebah. Daripada apa yang saya nampak, sebelum tendangan dilakukan, Naim dalam keadaan yang okay saja tetapi selepas tendangan dilepaskan dia agak kesukaran untuk bernafas.

[18] As to where PW9 was in relation to the deceased, it is PW9's evidence that 'Jarak saya dengan Naim pada hari tersebut 3 atau 4 kaki semasa ditendang'. PW9 claimed that he had clearly seen Rohimie kicking the deceased on the day of the incident.

[19] Dr Faridah bt Mohd Nor ('PW7') is a lecturer and an expert forensic consultant pathologist with Pusat Perubatan Universiti Kebangsaan. She had performed the post-mortem on the deceased. From an external examination of the deceased, PW7 had noted 'kecedaraan pada bibir bawah sebelah kiri, iaitu luka calar dan luka lebam'. She had also noted 'luka calar dan luka lebam pada dada sebelah kiri bahagian sisi di kawasan pertengahan dada'. PW7 had demonstrated which portion of the body she had meant by referring to the 'Bahagian belakang kiri tepi'. According to PW7, the external injuries were not fatal.

[20] As regards PW7's internal examination of the deceased, she had found 'kesan lebam pada mata sebelah kanan disebelah luaran dan juga dalaman bulu kening'. Apart from that, she had discovered 'pada bahagian dada iaitu paru-paru sebelah kiri menunjukkan ada kesan lebam pada lobus atas dan lobus bawah. Terdapat 3 kesan lebam. 1 di lobus atas manakala 2 lagi di lobus bawah' (p 68 of the appeal records), According to PW7, 'luka lebam itu adalah konsisten dengan impact luka calar dan lebam pada sebelah kiri dada ... Impact yang seperti ini boleh berlaku sekiranya daya yang digunakan agak kuat sehingga menyebabkan luka lebam pada bahagian organ dalaman' (p 69). PW7 had also noted that the deceased had no left circumflex artery.

[21] However, according to PW7, the cause of death was 'acute myocardial infarction due to coronary artery anomaly associated with the blunt trauma to the chest, iaitu sakit jantung yang acute disebabkan oleh anomaly pada salur darah coronary dan bersama-sama dengannya terdapat kecederaan tumpul pada dada.' (p 70).

[22] On the causation link, the learned deputy public prosecutor had referred to the evidence of PW7 in relation to the 'fight and flight reaction'. She described this fight and flight reaction as follows:

> Apabila berlaku kecederaan tumpul pada dada, ia menyebabkan fight and flight reaction iaitu reaksi melawan dan ingin lari di mana boleh berlaku peningkatan hormone seperti adrenalin di dalam darah. Apabila keadaan ini berlaku, jantung akan berdenyut lebih cepat dari biasa dan ia memerlukan oxygenated blood lebih dari biasa dan keadaan jantung yang tidak mempunyai left circumflex coronary artery dalam kes ini menyebabkan jantung tidak dapat berfungsi dengan baik dan seterusnya menyebabkan kematian.

[23] It is thus the submission of the learned deputy public prosecutor that there is a causation link between the respondent's action and the death of the deceased in that if not for the action of the respondent in kicking the deceased with force at the bahagian 'dada', the deceased would not have died.

[24] On this issue, the court is of the view that in order to prove the causation link, the prosecution would have to first prove the actus rea namely that it was the respondent that had caused the act which triggered the cardiac arrest or heart attack or that the deceased's heart attack was caused by the respondent's act in kicking him on his chest or dada from the right side and under the deceased.

Ground 3.4 relates to whether the magistrate had drawn inferences and assumptions which were not based on the evidence of the prosecution's witnesses.

[25] The learned deputy public prosecutor has submitted that the learned magistrate was in error when she stated that PW7 had agreed that there was a possibility that the heart attack had occurred first before the occurrence of the blunt trauma injury to the lungs.

[26] The court agrees that this finding of the learned magistrate was in error. That was clearly not what PW7 had said. Despite rigorous cross-examination on this issue, the good doctor had maintained that she could not determine which had occurred first.

[27] At p 14 of the appeal records, the learned magistrate had also stated that the 'siri penderaan mental dan fizikal senior-senior yang lain yang telah menyebabkan stress dan keletihan melampau kepada simati'. On this score, the learned deputy public prosecutor had submitted that there was no evidence adduced to this effect. On the contrary, the evidence of both PW8 and PW9 was that before the incident, the deceased Naim was 'dalam keadaan biasa, sihat'. In fact before the incident, Naim had undergone hemmerlight, skuad hopping without any ill effects. PW9 had also testified as much when he said that 'Sepanjang saya mengenali dia, secara fizikalnya dia seorang yang tough, fit, boleh bermain sukan. Dari segi kesihatan dia ... jarang sakit'.

[28] Thus on this issue, although it is in evidence that on the day in question, the Form 4 students including the deceased had undergone a series of rigorous exercises or ragging or bullying by the SUO and the seniors, whether these had in fact contributed to the deceased's subsequent heart attack is but mere conjecture.

Ground 3.5 — The magistrate drew an assumption that 'sekiranya si mati berada di bahagian bawah sekali sudah tentulah impak yang mengenai badan si mati

semasa pyramid ini roboh adalah lebih kuat berbanding mereka yang berada di atas' when PW8 and PW9 did not state so in their evidence.

[29] The learned deputy public prosecutor had submitted that the learned magistrate had erred in law and in fact when she made an assumption about the position of the deceased being at the bottom of the pyramid. Since PW8 and PW9 were not able to ascertain the position of the deceased at the time when the pyramid was being formed, it was submitted that it was not right for the learned magistrate to make a finding of fact that the deceased was at the bottom of the pyramid and its impact on the deceased.

[30] On this ground, the court notes that the learned deputy was in error when she submitted that the learned magistrate had made a finding of fact that the deceased was at the bottom of the pyramid. A careful perusal of the grounds of judgment of the learned magistrate as can be seen at p 14 of the appeal records will reveal that she made no such finding of fact. The relevant portion of her grounds reads as follows:

> Selain itu, SP8 dan SP9 tidak dapat memastikan di bahagian manakah kedudukan si mati semasa melakukan pyramid manusia. *Sekiranya* si mati berada di bahagian bawah sekali sudah tentulah impak yang mengenai badan si mati semasa pyramid ini roboh adalah lebih kuat berbanding mereka yang berada di atas. (Emphasis added.)

[31] From a reading of the above passage in the grounds of judgment, the court is unable to agree with the learned deputy that the learned magistrate had made a finding of fact as to the position of the deceased in the pyramid. The reference to SP8 and SP9 not being able to determine where exactly was the deceased's position in the pyramid as well as the use of the word 'Sekiranya' would show that the magistrate had *NOT* made any finding of fact to the effect that the deceased's position was at the bottom of the pyramid.

[32] As such, the court finds this ground of appeal of the learned deputy to be without merit.

Clause 3.6 — that the learned magistrate had erred in law and in fact when she 'terlalu mengambilkira' that a wrong CPR process could cause fatal consequences especially when the victim was in a critical condition when the evidence adduced did not state how the CPR was carried out

[33] At p 16 of her grounds of judgment, the learned magistrate had stated that PW8, PW9 and PW10 'seolah-olah tidak mahu memberitahu Mahkamah siapakah yang telah melakukan CPR atas si mati semasa kejadian'. The learned magistrate went on to say that 'dari bacaan', she understood that 'proses CPR

yang salah boleh menyebabkan keadaan fatal terutama apabila mangsa menghadapi keadaan yang kritikal. Hanya mereka yang terlatih sahaja boleh melakukan CPR yang betul'.

[34] Whilst it is true that none of the prosecution witnesses had testified as to the manner in which and by whom the CPR was administered on the deceased, it is questionable whether this factor was of any particular importance in the decision of the learned magistrate in not calling for the defence.

Clauses 3.7 and 3.8 — Whether the learned magistrate had failed to consider the existence of knowledge on the part of the respondent that his 'tendangan kuat' on the deceased could have caused his death or cause such injury that could cause death/whether the learned magistrate had erred in law and fact when she found that that the prosecution had failed to prove that the respondent had the requisite knowledge as there was no evidence that such an incident had ever occurred at the Maktab

[35] Although the learned magistrate may well have considered some factors which should not have been considered in arriving at her decision not to call upon the respondent to enter upon his defence, the court is of the view that, in the final analysis, the main and most important issue for the consideration of the court is whether the magistrate was correct in her finding that the prosecution had failed in proving the essential ingredients of the charge.

[36] Whilst it is true from the evidence of PW8 and PW9, who were both present at the place and the time of the incident, that it was the respondent who had given a hard kick to the 'bahagian dada' of the deceased at a time when the latter was in a hemmerlight position, the question that has still to be answered is whether it was the respondent's action that had caused the death of the deceased.

[37] In the face of the evidence of Dr Faridah bt Mohd Nor (PW7), an expert pathologist who performed the post mortem on the deceased, the court accepts that the deceased had a peculiar medical condition of having no left circumflex coronary artery. This medical condition was described by her as follows:

> Left circumflex artery adalah saluran darah di jantung yang menghantar darah beroksigen kepada bahagian kiri jantung dan dalam kes ini tiada oxygenated blood yang dapat disalurkan pada kiri jantung.
>
> Ini adalah sejenis penyakit di mana ia hanya dapat dikesan ketika lahir, itu pun sekiranya dilakukan ujian-ujian tambahan seperti coronary and geography dan selain daripada itu ia tidak dapat dikesan kecuali ketika autopsy. Is sangat jarang berlaku. la bergantung kepada individu, ada yang tidak mengalami apa-apa simptom manakala ada juga sebahagian yang mengalami sakit jantung. Dalam keadaan biasa, la tidak menyebabkan apa-apa simtom. Biasanya sekiranya tidak ada

saluran left circumflex coronary artery, oxygenated blood akan disalurkan juga kepada bahagian kiri jantung daripada saluran darah sebelah kanan iaitu right coronary artery.

[38] The court also notes PW7's evidence that the cause of death was 'acute myocardial infarction due to coronary artery anomaly associated with the blunt trauma to the chest', that is, in simple words, a severe heart attack caused by his abnormal condition of not having a left circumflex coronary artery together with blunt trauma to the chest.

[39] PW7 had offered further clarification that when there is blunt trauma to the chest, it would result in a 'fight and flight reaction' where there would be an increase in the level of hormones such as adrenalin in the blood. As a result, the heart will beat faster than normal and require more oxygenated blood than normal. In a person without a left circumflex coronary artery, the heart would not be able to function as well as a normal heart would. And a lack of oxygenated blood could cause cardiac arrest and death.

[40] Dr Faridah (PW7) had also testified that the medical condition of not having a left circumflex coronary artery is not a condition that can be easily detected. The fact that a person with such a condition may manifest no symptoms is borne out by the fact that PW8 nor PW9, who were the respondent's Form 4 mates, had testified that the deceased was a rugby player. Physically he was a tough boy, fit and loved to play sports. From the medical aspect, he was seldom sick. They had not testified as to the deceased having any medical condition.

[41] It is also in evidence that before the date of the incident, activities such as were carried out on the day of the incident had been carried out in the past. The SUO, the Sarjan or the PK could give instructions to assemble or to carry out exercises. The SUO could also give instructions as to any punishment or penalty to be meted out to the students. That had also happened before in the past.

[42] Based on the above, the learned magistrate was correct when she said that the respondent would have no cause to believe that the deceased was suffering from any ailment or was suffering from any ailment where a kick to his chest ('dada') would or could have proved fatal.

[43] The learned deputy public prosecutor had submitted that there is no requirement in law for the prosecution to prove that the respondent knew about the deceased's medical condition before he can be found guilty of an offence under s 304(b) of the Penal Code. Reference was made to s 299 of the Penal Code and Explanation 1 thereto which reads as follows:

299 Culpable homicide

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Explanation 1 — A person who causes bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

[44] Based on the above, the learned deputy has submitted that:

... penjelasan 1 kepada Seksyen 299 Kanun Keseksaan jelas menunjukkan bahawa undang-undang membuat anggapan bahawa suspek yang mencederakan mangsa yang sakit dianggap telah menyebabkan kematian mangsa tersebut meskipun keadaan itu tidak memberi keputusan yang sama bagi orang yang biasa. Bahkan penjelasan 1 di atas jelas tidak menuntut pihak pendakwaan membuktikan bahawa tertuduh mengetahui keadaan penyakit mangsa jika berbandingkan dengan keperluan pembuktian tersebut di bawah illustration (b) kepada Seksyen 300 Kanun Keseksaan.

[45] Whilst the prosecution may not be required to prove that the respondent knew that the deceased was suffering from a medical condition of having no left circumflex coronary artery, however the court is of the considered view that the appellant cannot run away from the necessity of having to prove not only that it was the respondent who had done an act (the actus rea) but also that he had the requisite knowledge (the mens rea) under s 304(b) that the act that was done was likely to cause death or to cause such bodily injury that is likely to cause death.

[46] Whilst the learned magistrate may have been in error in using the word 'niat' when she held that the prosecution had failed to prove 'niat dan status pengetahuan penama mengenai tendangannya itu boleh menyebabkan kematian kepada si mati' however, the court is in agreement that the appellant had failed to prove that the respondent had the knowledge that his action of kicking the deceased in the chest, albeit hard, is likely to cause death.

[47] Reference is made to the case of *Public Prosecutor v Mahfar bin Sairan* [2000] 4 MLJ 791 cited by learned counsel for the respondent where the court had held as follows:

Section 304(b) on the other hand merely requires knowledge, whether direct that is to say, an awareness or understanding that a fact or circumstance probably exists; or constructive that is to say, of the kind that one using ordinary care or diligence would possess (see *Merriam Webster's Dictionary of Law*, 1996 Ed).

Given the situation the accused was in (as described earlier), I am unable to come to a finding that the accused had the knowledge that by accelerating away while the

deceased was at the right side of the car holding on to the wing mirror that he had the knowledge that this act was likely to cause the death of the deceased.

...

One can of course reasonably conclude that by accelerating away in such a violent manner, the accused had the knowledge that some harm may be caused to the deceased to the extent that some form of grievous hurt could have been caused to the deceased. But the offence of culpable homicide requires knowledge that death is likely to result — not merely knowledge that grievous hurt is likely to result — a criteria which for the reason alluded to earlier had not been established

...

I must accordingly so find for the reasons given that the accused could not under the circumstances have committed an offence of culpable homicide not amounting to murder under s 304(a) or (b) of the Penal Code.

[48] In the face of the evidence adduced in this case where all the students of Form 4 were to receive the punishment or personal penalty in the form of a kick to the *dada* whilst the recipient was in a hemmerlight position, and where the evidence shows that two others before the deceased had received the personal penalty on the day in question, and other students were also to receive the penalty after the deceased, the court is unable to find that these circumstances would show knowledge that such a kick to the *dada* would be likely to cause the death of the recipient of the kick. The court is in agreement with learned counsel for the respondent that if the SUO or the respondent had the knowledge that a kick to the *dada* at hemmerlight position is likely to cause death, surely no one would ever undertake to do the punishment nor would anyone agree to receive the punishment.

[49] As regards the actus rea or whether it was the respondent who had done the act, the court notes the presence of a number of puzzling factors which has received no satisfactory answers. According to PW7, the deceased had died of a heart attack that was precipitated or triggered by blunt trauma to the chest. PW7 had further testified as to the injury on the lung which was caused by blunt trauma. She explained that to cause the bruises as seen at photographs C and D at p 265 of the appeal records, the impact has to be applied to the back of the deceased on *the left side*. And the impact that is applied has to be substantial.

[50] The next question is whether the evidence adduced would show that it was the respondent who had caused the injury to the back of the deceased on his left side. In this context, the evidence of those who saw the respondent's act of kicking the deceased places him on the right side of the deceased whilst he was administering the kick. Whilst the learned deputy public prosecutor had sought valiantly to argue that a kick to the dada of the deceased whilst in a hemmerlight position could inflict the bruises seen in photographs C and D at

p 265 of the appeal records, and the blunt trauma to the deceased's lungs, the court is not so convinced merely on the strength of her submissions. The court is unable to see or to accept how a kick given from the right side of the deceased, aimed from under, and to his chest area, could inflict the injury on the deceased's back to his left side. On this score, whilst the court accepts that the respondent did kick the deceased, the court is not satisfied that the prosecution has succeeded in proving that it was the respondent who had caused the blunt trauma to the deceased lungs and the injuries to his left back, which in turn had led to the deceased's heart attack.

[51] Section 173(f) of the Criminal Procedure Code provides as follows:

> (f)(i) When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (ii) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

[52] There is no dearth of authorities as to the meaning of a prima facie case. In the case of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734, the Court of Appeal had occasion to deal with the meaning of a prima facie case. At p 749, His Lordship Gopal Seri Ram JCA had held as follows:

> [3] Under s 180 of the Criminal Procedure Code (Revised 1999), the duty of a judge, sitting alone, at the close of the case for the prosecution, is to determine, as a trier of fact, whether the prosecution has made out a prima facie case against the accused. The judge has only one exercise to undertake; he must subject the evidence of the prosecution to a *maximum evaluation* and then ask himself this question: If I decide to call the accused to enter on his defence, and he elects to *remain silent*, am I prepared to convict him on the totality of the evidence contained in the prosecution's case? If the answer is in the negative, then no prima facie case has been made out, and the accused is entitled to an acquittal. (Subjecting the prosecution's evidence to a maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at that intermediate stage).
>
> [3a] Consequently, a judge is *not* to undertake an initial minimum evaluation of the prosecution's evidence (followed by a maximum evaluation if the accused elects to remain silent) under s 180 of the Criminal Procedure Code (Revised 1999). (Emphasis added.)

[53] Based on the evidence as adduced, the learned magistrate, on a maximum evaluation of the whole of the evidence adduced in this case, had found that the prosecution had failed to make out a prima facie case against the

respondent. As the prosecution had failed to establish both the actus rea, that is that it was the respondent who had caused the injury to the left back of the deceased or the blunt trauma to his lung, nor the mens rea, namely that the respondent had the necessary knowledge that the act that was done by him would be likely to cause death, the court finds that the magistrate was not in error when she decided that a prima facie case had not been made out and acquitted and discharged the accused without calling for his defence.

[54] In this case, a young life has been lost. The story that has unfolded through the evidence of PW8 and PW9 about the existence of extreme forms of ragging and bullying by seniors in authority at the Maktab Tentera Diraja, Kem Tentera Sg Besi has naturally evoked feeling of horror and disgust in the minds of all right thinking members of society that such activities can still exist or be allowed to exist today in our enlightened society. However, care must be taken not to allow our feelings of disgust and horror to override the need for proof in this as in all cases.

[55] Accordingly, the court herewith affirms the order of acquittal and discharge of the respondent as ordered by the learned magistrate in the court below.

Appeal dismissed and order of acquittal and discharge affirmed.

Reported by Afiq Mohamad Noor